



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-2246

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198163.

The Office of the District Attorney of the Thirty-Fourth Judicial District (the "district attorney") received a request for the prosecution file pertaining to cause number 20010D03257. You indicate that some responsive information has been released to the requestor. You claim, however, that the remainder of the information at issue is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We must first address the district attorney's obligations under section 552.301 of the Government Code. Sections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Public Information Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

You indicate that the district attorney received the present request for information on December 30, 2003. Accordingly, you were required to submit your request for a decision from this office no later than January 14, 2004. Your request was mailed on January 15, 2004. Consequently, we determine that the district attorney failed to request a decision within the ten business day period as mandated by section 552.301(b) of the Government Code. *See* Gov't Code § 552.308(a) (ten day requirement met if the request bears post office cancellation mark indicating time within ten day period, or if the governmental body furnishes satisfactory proof that the request was deposited in the mail within that period).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982).

The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* Open Records Decision No. 586 at 3 (1991). Although you raise section 552.108, you have not demonstrated a compelling reason to withhold the information at issue under section 552.108. *Id.* Accordingly, we find you have waived your claim under section 552.108 in this instance and we determine that none of the information at issue may be withheld under section 552.108. Because section 552.101 can provide a compelling reason to withhold information from disclosure, however, we will address your claims under these exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and

encompasses information made confidential by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201. We understand you to represent that the information submitted as Enclosure 6 consists of documents used or developed by the Department of Family and Protective Services and provided to the district attorney pursuant to an investigation of abuse or neglect under chapter 261 of the Family Code.¹ Based on your representations and our review of the information, we find that the information in Enclosure 6 is within the scope of section 261.201 of the Family Code. You have not indicated that the district attorney has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the information in Enclosure 6 is confidential pursuant to section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code.² *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Next, criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would

¹ The Seventy-eighth Legislature renamed the former Texas Department of Protective and Regulatory Services as the Texas Department of Family Protective Services. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 (“A reference in law to the Department of Protective and Regulatory Services means the Department of Family and Protective Services.”).

² We note, however, that if the Texas Department of Family and Protective Services has created a file on this alleged abuse, the child’s parent(s) may have the statutory right to review that file. *See* Fam. Code § 261.201(g).

not be eligible to receive the information itself.”). Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. We determine that the CHRI in Enclosure 7 is confidential by law in the hands of the district attorney and must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code.³

The remaining documents contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 of the Government Code provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov’t Code § 552.130. We have marked a Texas driver’s license number that the district attorney must withhold under section 552.130 of the Government Code. We note, however, that the requestor’s Texas driver’s license number may not be withheld under section 552.130 in this instance. *See* Gov’t Code § 552.023 (person has special right of access to information that is excepted from public disclosure under laws intended to protect person’s privacy interest as subject of the information).

In summary, we determine the district attorney has waived section 552.108 as an exception to disclosure in this case. The information submitted as Enclosure 6 must be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The information in Enclosure 7 must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code. We have marked a Texas driver’s license number that the district attorney must withhold under section 552.130 of the Government Code. The remainder of the submitted information must be released to the requestor. We note, however, that because the information to be released to the requestor contains information that may be confidential with respect to the general public, in the event the district attorney receives another request for this information from a person other than

³ While the district attorney must withhold the CHRI relating to the requestor, DPS has the authority to release an individual’s own CHRI to that individual. *See* Gov’t Code § 411.083(b)(3).

this requestor or her authorized representative, the district attorney must request a decision from this office prior to releasing any information. *See* Open Records Decision No. 481 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person himself or herself).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 198163

Enc: Submitted documents

c: Ms. Martha Montoya
1700 Hawthorne #125
El Paso, Texas 79902
(w/o enclosures)